

103.

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-4739-2011 (O&M)

Date of decision:01.02.2017

Mahabir

... Appellant

versus

Kamlesh Rani Sharma and another

.... Respondents

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA

Present: Mr. Vikram Singh, Advocate,
for the appellant.

Mr. Ashok Kumar Nabhewala, Advocate,
for the respondents.

HARI PAL VERMA, J.

The appellant (herein as defendant) has filed the present Regular Second Appeal against the judgment and decree dated 06.09.2011 passed by learned Additional District Judge, Kurukshetra whereby his appeal against the judgment and decree dated 10.03.2010 passed by learned Civil Judge (Junior Division), Kurukshetra was dismissed.

Briefly stated, respondent No.1-Kamlesh Rani (herein as plaintiff) has filed a suit for permanent injunction restraining the defendants from damaging, demolishing or dismantling any portion of the house of the plaintiff and the wall EF as shown in the site plan and further restraining the defendants from fixing any door, window etc. in the wall EF towards the house of the plaintiff and also restraining the defendants from interfering in the peaceful possession of the plaintiff.

As per the plaint, the plaintiff purchased House No.1372, Ward No.12, Village Mirjapur Didar Nagar, Tehsil Thanesar, District Kurukshetra, vide sale deed dated 12.04.1999, measuring 75 square yards with the following boundaries:-

*“North: House of defendants.
South: House of Harbans Singh;
East: House of Nahar Singh, and
West: Main Gali 20 feet wide.”*

The house of the defendants is situated on the northern side of the house of the plaintiff. Since the defendants wanted to demolish the wall of the plaintiff from point E to F and to fix window and doors forcibly and illegally, a suit for injunction was filed by the plaintiff.

The defendants have filed written statement pleading therein that they purchased the house in the year 1989 i.e. at least 10 years prior to the purchase of the house by the plaintiff. The disputed wall is common and earlier there were *karries* and now, it was having lintel by the defendants much prior to the filing of the suit. According to the appellant-defendant, all three side walls are common as there is a *gali* in the west as per sale deed dated 12.04.1999 as relied upon by the plaintiff, but this fact has been concealed. The defendants also filed counter-claim stating therein that they are owner in possession of House No.21/12 B situated at Didar Nagar, Thanesar, measuring 120 square yards i.e. 4 Marlas in Khasra No.5/27 min, bounded as under:-

*“ North: House of Smt. Jasmer Kaur;
South: House of Mahender Singh;
East: House of Jasmer Kaur; and
West: Rasta share-am 22 ft. wide.”*

On the aforesaid pleadings, the learned trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to a decree for permanent injunction restraining the defendants from damaging and demolishing etc. any part of the house of the plaintiff as detailed in para No.1 of the plaint? OPP*
- 2. Whether the plaintiff has no locus standi and cause of action to file and maintain the present suit? OPD*
- 3. Whether the plaintiff is estopped by her own act and conduct from filing the present suit? OPD*
- 4. Whether the plaintiff has concealed the true and material facts from the court? OPD*
- 5. Relief.”*

The plaintiff examined her husband as PW1 who is holding her power of attorney (Ex.P1). He has stated that his wife is the owner of the suit property vide sale deed dated 12.04.1999 (Ex.P2) and site plan of the suit property is Ex.P3. The wall shown in Ex.P3 from point E to F is in their possession, but defendants forcibly tried to affix door on the same. Even after stay order from the court, the defendants affixed the door on the wall at point E to F, for which, contempt petition was filed. On the other hand, the defendants have examined their son as DW1, who, while tendering his affidavit as Ex.DW1/A, has reiterated the contents of written statement. The trial Court vide judgment dated 10.03.2010 decreed the suit and held as under:-

“25. Keeping in view the limited evidence on record, this court is of the considered view that since Ex.P3 has not been disputed by the defendants rather the same has been admitted by DW1 in his cross-examination and further keeping in view the fact that Ex.P3 is similar to the site plan which has been scribed on the sale deed i.e. Ex.P2 of the house of the plaintiff, it is crystal clear that the wall adjoining the

house of the plaintiff and defendants is joint/common in nature from point C to point E measuring 36 ft. 5 inches and thus, defendants cannot be allowed to open any door/window in this wall towards the side of the land of the plaintiff. Though, the defendants have every right to use the common wall but they cannot be allowed to use the common wall in any manner which may cause damage to the rights of the plaintiff or may interfere in the possession of the plaintiff. Admittedly, the defendants have opened a gate/door in the portion EF of the common wall, which is a part of common wall, thus, the defendants cannot be allowed to open this door towards the land of the plaintiff. It cannot be said that this gate is being opened in the gali/street because its direction is towards the side/land of the plaintiff.

26. In view of above said discussion, plaintiff is entitled for permanent injunction to the effect that the defendants be restrained from interfering, demolishing, damaging the common wall from point C to point E by way of opening any door/window towards the land of plaintiff. However, as already mentioned that during the pendency of the suit, the defendants have already opened a door in the common wall towards the side of the plaintiff and thus, the relief of permanent injunction sought by the plaintiff qua the door/window has become infructuous, therefore, in the interest of justice and to avoid multiplicity of litigation and for imparting complete justice to the parties, this court is of the considered view that plaintiff is also entitled for the relief of mandatory injunction directing the defendants to close the door which opens towards the side of the plaintiff on wall EF. Accordingly, issue no.1 is decided in favour of the plaintiff and against the defendants.”

Aggrieved against the aforesaid judgment and decree dated 10.03.2010, the defendants preferred the appeal. However, the appeal was dismissed vide judgment and decree dated 06.09.2011.

It is in the aforesaid circumstances, the appellant has filed the present regular second appeal before this Court.

Learned counsel for the appellant has argued that the site plan (Ex.P3) has not been duly proved as neither the plaintiff has been examined nor the person, who prepared the site plan has been examined. He has further argued that the husband of the plaintiff, namely, Shiv Kumar Sharma has appeared as PW1 in his capacity as General Power of Attorney and, therefore, in view of judgment rendered by the Hon'ble Supreme Court in **Janki Vashdeo Bhojwani Versus Indusind Bank Limited-2005(2) SCC 217**, statement and cross-examination of power of attorney on behalf of plaintiff or defendant is not permissible. He cannot be allowed to appear and depose as a witness on behalf of the principal in the matters of his personal knowledge. A person holding General Power of Attorney can only appear as a witness in his own capacity to depose with regard to the acts done by him on behalf of the principal. He has further argued that the site plan (Ex.P3) has not properly been proved as the person, who prepared the site plan, has not been examined.

On the other hand, learned counsel for the respondents, while referring to the judgment of the Hon'ble Supreme Court rendered in **Ashok Rangnath Nagar Versus Shrikant Govindrao Sangvikar-2015 (4) R.C.R. (Civil) 948**, has argued that since there is a concurrent finding on facts recorded by both the courts below and unless the appellant satisfies the Court that there is a substantial question of law, jurisdiction under Section 100 of CPC cannot be exercised. He has further argued that there is no illegality in the judgments and decrees

passed by the courts below. The court has framed issues in the case and consequently, returned its finding on each issue. Since the site plan (Ex.P3) has not been disputed by the appellant-defendant, rather the same has been admitted by DW1 in his cross-examination that Ex.P3 is similar to that site plan which has been scribed on the sale deed i.e. Ex.P2, no illegality has been committed by the courts below while accepting the site plan (Ex.P3).

I have heard learned counsel for the parties.

Learned counsel for the appellant has formulated the following issues:-

- “(i) Whether the findings of the learned courts below suffering from any apparent perversity as the face of it being contrary to law and facts on record?*
- (ii) Whether the judgments and decrees of learned courts below suffer from perversity of approach and misreading of evidence because of ignoring the material piece of evidence have been direct impact on decision of the case?*
- (iii) Whether the impugned judgments and decree are legal and valid in law?*
- (iv) Whether no reply given by the plaintiff/respondent of the counter claim filed by the defendant/appellant amounts to admission on her behalf?*
- (v) Whether the Ld. Courts below have an any inherent power to convert the suit for permanent injunction into mandatory injunction which is beyond the pleadings of the suit and the relief claimed by the respondent/plaintiff?”*

Respondent No.1-plaintiff has filed a suit for permanent injunction restraining the appellant-defendants from damaging, demolishing or dismantling any portion of the house of the plaintiff and the wall EF claiming therein that she is the owner of the land towards

north side and there is a wall of the house of the plaintiff in north, but the defendants want to demolish the wall of the plaintiff from point 'E' to 'F' by fixing a window/door with a view to grab the land of the plaintiff. The dispute is regarding common wall i.e. CD and EF as per site plan (Ex.P3) and the parties are neighbours. PW1, who is holding power of attorney, is husband of the plaintiff and, therefore, the plea as raised by learned counsel for the appellant that he (plaintiff's husband) being a power of attorney cannot be allowed to appear and depose as a witness on behalf of the principal in the matters of his personal knowledge, cannot be accepted. His relation with the plaintiff has led to unequivocal fact that he is in the personal knowledge of the facts which are otherwise in the knowledge of the plaintiff herself. Therefore, the judgment referred in **Janki Vashdeo Bhojwani** (supra) is not applicable to the facts and circumstances of the present case and is quite distinguishable.

The argument of the learned counsel for the appellant that Ex.P3-site plan was not proved in accordance with law needs outright rejection as DW1 has not disputed the said site plan in its clear terms. So far as the counter-claim of the appellant-defendants is concerned, the same has rightly been considered by the courts below and the appellant-defendants have been given a right that without causing any damage or harm to the plaintiff, he can use the common wall. Therefore, this Court does not find any illegality in the judgments and decrees passed by the courts below.

The concurrent finding of facts recorded by the courts below need no interference as these are well founded and based on facts.

No substantial question of law arises in the present regular second appeal and the same is, accordingly, dismissed.

(HARI PAL VERMA)
JUDGE

01.02.2017
sanjeev

Whether speaking/reasoned? Yes/No
Whether reportable? Yes/No